RE ONG THIM KUANG, EX P PUBLIC BANK BHD (NO 2)

HIGH COURT KOTA BHARU, KELANTAN
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-148-1993]
30 JULY 2000

BANKRUPTCY: *Receiving and adjudication orders - Stay of execution pending appeal to set aside orders - Difference between stay of execution and stay of proceedings - Whether adjudication order ought to be set aside if stay of execution could be granted - On what grounds may stay of execution be granted - Rules of the High Court 1980, O. 45 r. 11 - Bankruptcy Act 1967, s. 10(2)*

CIVIL PROCEDURE: *Execution - Stay - Stay of execution of receiving and adjudication orders - Whether stay ought to be granted*

This was an application to stay the execution of receiving and adjudication orders pronounced against the applicant pending the disposal of his appeal to set aside the said orders.

Held:

[1] The closest provision available pertaining to the matter under discussion was r. 89(c) of the Bankruptcy Rules 1969. Unfortunately, the words legislated read that "no appeal shall operate as a stay of proceedings under the judgment or order appealed from unless the court otherwise directs". It does not say stay of execution. These two phrases are dissimilar in meaning.

[1a] A stay of proceedings, as opposed to a stay of execution, envisages a scenario where the matter before the judge is still pending. Proceedings may be stayed either at the stage of court action prior to final judgment or even in the midst of a bankruptcy action. Under r. 138 of the Bankruptcy Rules 1969, a court is permitted to include in a receiving order an order of stay of the action or proceedings against the debtor or staying proceedings generally. Again the stress is on "stay of proceedings" and not "stay of execution". On that premise, a "stay of proceedings", or usage of that phrase for purposes of bankruptcy, is only possible or applicable before the debtor is adjudged bankrupt.

[2] Once an adjudication order is pronounced, the debtor for all intents and purposes is a bankrupt. Thereafter, apart from his personal movements being curtailed, under s. 24(4) of the Bankruptcy Act 1967, the official

assignee takes over control and possession of his property. Even his rights to proceed with legal actions are curtailed, as inhibited by s. 38(1)(a) of the Bankruptcy Act 1967. Therefore, if a stay of execution could be granted, that adjudication order should be set aside under s. 92 of the Bankruptcy Act 1967 by the presiding judge before being *functus officio*. That could be the reason why the legislature promulgated O. 45 r. 11 of the Rules of the High Court 1980 in that manner, *ie*, a stay of execution may be granted on the ground of matters which have occurred since the date of the judgment or order. This same reasoning is equally applicable to s. 10(2) of the Bankruptcy Act 1967. In the instant case, there were no new factors adduced since the date of the adjudication order.

[Application rejected.]

Case(s) referred to:

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

Ex p, Wemyss [1884] 13 QBD 244 ***(refd)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon [2000] 3 CLJ 361 ***(refd)***

Kota Bahru Bankruptcy No. 29-454-97 ***(refd)***

Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 2 MLJ 588 ***(refd)***

Supreme Finance (M) v. Mohamad Noor Yusof [1993] 2 MLJ 29 ***(refd)***

Re A Bankruptcy Notice [1934] 1 Ch 431 ***(refd)***

Re Lim Ah Hee ex p, Perwira Affin Bank Bhd [1997] 4 CLJ 462 ***(refd)***

Re Sardar Ali [1955] 2 MLJ 140 ***(refd)***

Re Seah Kim Khoo George, ex p Mary Seah [1989] 3 MLJ cxxvi ***(refd)***

Realisations Industrielles Et Commerciales SS v. Loescher and Partners [1957] 1 WLR 1026 ***(refd)***

Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia [1995] 2 CLJ 368 ***(refd)***

WT Lamb & Sons v. Rider [1948] 2 All ER 402 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 5, 6(3), 10(2), 15, 24(3), (4), (5), 26, 38(1)(a), 92(2)
Bankruptcy Rules 1969, rr. 89(c), 138
Courts of Judicature Act 1964, s. 73
Rules of the High Court 1980, O. 45 r. 11, O. 27 r. 1, O. 56

Other source(s) referred to:

A Guide to Bankruptcy, 1978, PG Eales & PAF De Vos
Banking Law, S Twum
Halsbury's Laws of England, 4th edn, vol 17, p 269 para 451, p 336 para 617
Williams on Bankruptcy, 18th edn

For the judgment debtor - C Jegathesan; M/s C Jegathesan
For the judgment creditor - Aznan Mohamed; M/s Rithauddeen & Aziz

Reported by S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

This case has a chequered history of the applicant bankrupt doing everything legally possible to clear his name from the ever growing list of bankrupts. The matter began with the Senior Assistant Registrar granting the receiving and adjudication orders on 8 June 1999, followed by a rejection of the appeal before me on 1 January 2000 to set aside those orders. Being persistent, and pursuing a different line of action, the applicant bankrupt filed encl. 28, which is the current application to stay the execution of the receiving and adjudication orders, pending the disposal of the appeal against my 1 January 2000 decision, before the Court of Appeal. Herewith is my decision. To appreciate my grounds and reasoning, it is necessary for me to lay down first in brief the procedural and substantive law pertaining to bankruptcy matters.

After an act of bankruptcy has occurred, a creditor may file a creditor's petition subject to the prerequisites of the Bankruptcy Act 1967. Among the conditions to be satisfied are that, a creditor shall not be entitled to present a bankruptcy petition against a debtor unless the aggregate debt is not less than RM10,000, the debt being a liquidated sum payable either immediately or at some certain future time, the act of bankruptcy having occurred within six months before the presentation of the petition, and the debtor being domiciled in Malaysia within one year before the date of the presentation of the petition (s. 5 Bankruptcy Act 1967). That petition shall be verified by the affidavit of the creditor and shall be served as prescribed by the law. At the hearing date the court shall require proof of the debt of the petitioner creditor, the act of bankruptcy, the service of the petition and if satisfied may thereafter make a receiving order. A receiving order if granted, is to provide protection for the estate of the debtor, with the official assignee acting as the receiver who shall thenceforth take possession of all books of account of the debtor's property. This order does not make the debtor a bankrupt nor is he deprived of his ownership over his property; he merely loses possession and control of them. Thereafter no creditor shall have any remedy against the property or person of the debtor, unless with the leave of the court. That receiving order may be rescinded later by the High Court if the need arises (*Ex p, Wemyss* [1884] 13 QBD 244). By virtue of s. 6(3) of the Bankruptcy Act, if the court is dissatisfied with the proof of the debt, or for some other sufficient cause, not only will the receiving order not be granted but it may dismiss the petition forthwith.

Under s. 24 it is mandatory for the court, after the making of a receiving order to adjudge the debtor bankrupt (generally referred to as an adjudication order), unless the latter can satisfy the court that he is in a position to offer a composition or scheme of arrangement satisfactory to his creditors. In that event, the court may adjourn the matter under s. 24(3) for purposes of considering them. The creditors at the first meeting, when considering that scheme or composition may if dissatisfied, resolve by ordinary resolution move that the debtor be adjudged bankrupt (read together with s. 15). If that resolution were to be accepted by the court, it shall thenceforth adjudge the debtor bankrupt (*Re Sardar Ali* [1955] 2 MLJ 140). When adjudged bankrupt, his property under s. 24(4) shall vest with the official assignee, with that property divisible among his creditors. Regarding the bankrupt's property, *Williams on Bankruptcy*, 18th edn authored:

> Broadly speaking the bankrupt's estate consists of every beneficial interest which the bankrupt has ... by his adjudication taken from him and given to the trustee, who steps into his shoes and takes a title no better and no worse than the bankrupt's ... .

Taking the matter further if the petitioner is successful in satisfying the requirements of the court, and the debtor subsequently is adjudged bankrupt, the petitioner may at any time thereafter by special resolution, resolve to entertain the debtor's proposal for a composition if any, in satisfaction of the debts. The procedure is the same as in the case of a composition or scheme accepted before adjudication; and upon approving the scheme the court may annul the adjudication.

A debtor may apply to the High Court to revise, rescind or vary any order made by it under its bankruptcy jurisdiction. Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as other orders emanating from the High Court for the time being are appealable. The application before me is for a "stay of execution" after an adjudication order has been meted down. The closest provision available, be it the Bankruptcy Act 1967 or the Bankruptcy Rules 1969 pertaining to the matter under discussion that could be of some assistance, is r. 89(c) of the Bankruptcy Rules 1969. Unfortunately the words legislated caused me certain misgivings, as it reads that no appeal shall operate as a stay of proceedings under the judgment or order appealed from, unless the court otherwise directs. It does not say stay of execution. By virtue of s. 92(2) of the Bankruptcy Act, which makes it incumbent upon me to cross-refer to O. 56 of the Rules of the High Court 1980, again I am confounded by the same predicament. This is so as sub-r. (4) similarly uses the phrase stay of proceedings. I have to take seriously the differentiation of these two phrases as it does not take too much research and dissertation to conclude that they are dissimilar in meaning. A

brief scrutiny of the Courts of Judicature Act 1964 (Act 91), in particular s. 73 that contained both phrases, confirms the awareness of Parliament of their different roles in matters of litigation. If both the phrases bore similar meaning surely for consistency sake, the legislature would have merely maintained the phrase of stay of proceedings. To resolve this matter permit me to pluck para. 451 at p. 269 of *Halsbury's Laws of England*, 4th edn, vol. 17 that reads:

> The court's power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order.

The pre-condition of that stay proceedings, will be dependant on the discretionary powers of the judge, as opposed to a stay of execution which is statutory based as per O. 45 r. 11 of the Rules of the High Court 1980. Vincent Ng J in *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon* [2000] CLJ JT 5 at p. 7 in clarification said:

> The court **does not**, however, have an inherent jurisdiction **over all** judgments or orders which it has made under which it can stay the execution of a judgment (emphasis mine).

Generally speaking too a stay of proceedings, as opposed to a stay of execution, envisages a scenario where the matter before the judge is still pending. Proceedings may be stayed either at the stage of the court action prior to final judgment, or even in the midst of a bankruptcy action. Under r. 138 a court is permitted to include in a receiving order an order of stay of the action or proceedings against the debtor or staying proceedings generally. Again the stress is on "stay of proceedings" and not "stay of execution". On that premise it is my view that a "stay of proceedings" or usage of that phrase for purpose of bankruptcy, is only possible or applicable before the debtor is adjudged bankrupt. Once the latter is adjudged bankrupt the term "stay of proceedings" will be exhausted.

It is generally accepted that a court action, with all its remedies may be split into two spheres *viz*. processes prior to a final judgment and that of the execution of that final judgment. The test of whether the order is a final judgment or otherwise depends on whether it disposes of the rights of the parties. If it does not then it is an interlocutory order (*Re Seah Kim Khoo George, ex p Mary Seah* [1989] 3 MLJ cxxvi; *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547). The execution of a judgment essentially is machinery for the purpose of enforcing judgments and orders (*WT Lamb & Sons v. Rider* [1948] 2 All ER 402). It is also incontrovertible that the normal execution proceedings must invariably include a bankruptcy action, the

last step in bringing to fruition the outcome of a lengthy action, and thereafter closing the chapter once and for all (*Re Lim Ah Hee ex p, Perwira Affin Bank Bhd* [1997] 4 CLJ 462).

As to the feasibility of a High Court judge to stay the execution of the adjudication order, an appreciation of the very order itself is required. It is trite law that once an adjudication order is pronounced the debtor for all intents and purposes is a bankrupt. S. Twum in "Banking Law" had occasion to author:

> Adjudication order: (1) This is the order of the court which effectively makes the debtor bankrupt. Until it is made the debtor is legally not bankrupt.

PG Eales and PAF de Vos in *A Guide to Bankruptcy* [1978] also had occasion to write:

> The making of an adjudication order by the Court in effect makes the insolvent debtor technically bankrupt and **from this stage on** until the order is discharged in any way the debtor is known as a 'bankrupt' ... From the **date of the adjudication order** the bankrupt will be subject to severe legal disabilities mentioned later (emphasis mine).

Halsbury's Laws of England, 4th edn at p. 336, para. 617 reads:

> The bankruptcy of an individual against whom a bankruptcy order has been made commences with the day on which the order is made, and continues until the individual is discharged.

In fact, the provisions of the relevant statute, *ie*, the Bankruptcy Act 1967, similarly mirrors the above authorities. A perusal of s. 24(5) of the Bankruptcy Act in crystal clear terms provides that notice of every order adjudging a debtor bankrupt shall be published in the gazette, with the **date of the order being the date of the adjudication**. When the adjudication is to be gazetted is not important. The date of the adjudication is. A scrutiny of s. 26 will confirm this view too, as even the creditors could resolve to entertain a proposal of composition in satisfaction of the debts due to them, at any time after the adjudication. Nothing is said of them meeting after the adjudication has been duly gazetted. From all the above it is quite conclusive that the debtor is effectively a bankrupt on the very day the adjudication order is pronounced. Thereafter, apart from his personal movements being curtailed, under s. 24(4) of the Bankruptcy Act the official assignee takes over control and possession of his property. Even his rights to proceed with legal actions are curtailed, as inhibited by s. 38(1)(a) of the Act (*Sabah Bank Bhd v. Syarikat Bintang Tengah Sdn. Bhd & Ors* [1992] 2 MLJ 588; *Supreme Finance (M) v. Mohamad Noor Yusof* [1993] 2 MLJ 29).

Section 10(2) of the Bankruptcy Act provides that the court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor. This provision empowers the court to suspend the action of the creditor or even some other third party against the debtor's property or person. It even empowers the court to stay any other unconnected pending proceedings *vis-a-vis* the bankruptcy proceedings, even though an adjudication order has been granted (*Realisations Industrielles Et Commerciales SS v. Loescher and Partners* [1957] 1 WLR 1026). In fact it is wide enough as a platform for the debtor to stay the execution of the adjudication order against himself (para. 371 *Halsbury's Laws of England*, 4th edn). Without restricting this conferment of power on a High Court judge, to stay the execution of the adjudication order, that invocation of power must be subject to certain legal logic. To appreciate this remark I would like to advert to O. 45 r. 11 of the Rules of the High Court 1980 for assistance. This provision reads:

> Without prejudice to Order 27 rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the **ground of matters which have occurred since the date of the judgment or order**, and the Court may by order grant such relief, on such terms, as it thinks fit (emphasis mine).

For purposes of this case, bearing in mind that the power to adjudicate is discretionary, any stay based on the "old" facts would be a contradiction in term. By acquiescing to such an application founded on those stale facts, as opposed to fresh and worthy grounds, would by implication be an admission that the earlier discretion had been wrongly exercised (regarding this discretionary power see in *Re A Bankruptcy Notice* [1934] 1 Ch 431; *Kota Bharu Bankruptcy No. 29-454-1997*; *Sama Credit & Leasing Sdn Bhd v. Pegawai Pemegang Harta, Malaysia* [1995] 2 CLJ 368). Therefore, if a stay could be granted primarily on those facts, that adjudication order should be set aside under s. 92 of the Bankruptcy Act by the presiding judge before being *functus officio*, and to grant the latter order only when the need arises. I will not be far off the mark if I opine that that could be the reason why the legislature promulgated the provision in that manner, *ie*, a stay of execution may be granted on the ground of matters which have occurred since the date of the judgment or order. This same reasoning is equally applicable for my stance of s. 10(2) of the Bankruptcy Act, as mentioned above that the conferment of power to allow the stay, is subject to certain legal logic.

Based on all the above reasons, and as I am unable to find any new factors that have been adduced since the date of the adjudication order, worthy and cogent enough for consideration and equally not denied by the applicant's

counsel, I have no hesitation in rejecting this application with costs. On that premise the bankrupt must resign himself to his new status. He will have to go through the painful ramifications and repercussion of that order, unless and until the High Court rescinds it, or the latter's appeal is successful before the Court of Appeal. If I may add, there is no barrier to prevent the debtor from resubmitting the same application before the Court of Appeal, as it has concurrent jurisdiction over the matter.